

July 24, 2006

Kent County - Civil Division (739-7641)

Mr. Jim Parks
2411 Berwyn Road
Wilmington, DE 19810-3524

**RE: Freedom of Information Act Complaint Against
Brandywine School District Board of Education**

Dear Mr. Parks:

We received your complaint dated May 26, 2006 alleging that the Brandywine School District Board of Education ("the Board") violated the open meeting requirements of the Freedom of Information Act, 29 *Del. C.* Ch. 100 ("FOIA"), by: (1) not providing sufficient notice to the public about the matters the Board would discuss in executive session on May 8, 2006; (2) discussing matters of public business in private on May 8, 2006 which FOIA did not authorize for executive session; and (3) not preparing adequate minutes of executive session meetings. ¹

¹ You also allege that the Board "is or is likely to be in violation of its fiduciary responsibility to the taxpayers and of the state in not properly arranging the termination of Dr. Harter's employment contract." As you acknowledge, "such a matter is beyond the scope of the Freedom of Information Act," and so we do not address it in this opinion.

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By letter dated May 31, 2006, we asked the Board to respond to your complaint by June 12, 2006. We granted the Board's request for a brief extension of time and received the Board's response on June 19, 2006.

The Board acknowledges that it discussed personnel and job applicant matters in executive session on May 8, 2006 even though the agenda only listed personnel for executive session. Because FOIA authorizes discussion of job applicant qualifications in private, the Board contends this agenda violation was technical and should not require remediation.

According to the Board, most of the discussion at the May 8, 2006 executive session involved personnel and job applicant matters authorized by FOIA for private discussion. The Board acknowledges that it discussed several procedural matters on May 8, 2006 which FOIA did not authorize for executive session.

The Board contends that the format it uses for recording minutes of executive sessions complies with the requirements of FOIA.

RELEVANT STATUTES

FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those" authorized for executive session. 29 *Del. C.* §10004(a).

FOIA authorizes a public body to meet in executive session to discuss "[p]ersonnel matters in which the names, competency and abilities of individual employees or students are discussed, unless the employee or student requests that such a meeting be open." *Id.* §10004(b)(9).

FOIA also authorizes a public body to meet in executive session to discuss "an individual citizen's qualifications to hold a job or pursue training unless the citizen requests that such a meeting be open." *Id.* §10004(b)(1).

FOIA requires public bodies to "give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda," *Id.* §10004(d)(2).

FOIA defines an "agenda" as "a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor under subsection (b) of Section 10004 of this title." *Id.* §10001(f).

FOIA requires that "[e]ach public body shall maintain minutes of all meetings, including executive sessions, conducted pursuant to this section," *Id.* §10004(f). "Such minutes shall include a record of those members present and a record, by individual members . . . of each vote taken and action agree upon." *Id.*

LEGAL ANALYSIS

A. May 8, 2006 Meeting Agenda

"FOIA's agenda requirements for executive session are less stringent than for the matters to be discussed during the public portions of a meeting" because the executive session is closed to the public. *Att'y Gen. Op.* 05-IB26 (Aug. 29, 2005). FOIA "simply requires public bodies to disclose the purpose of executive sessions in the agenda." *Common Cause of Delaware v. Red Clay Consolidated School District Board of Education*, C.A. No. 13798, 1995 WL 733401, at p.4 (Del. Ch., Dec. 5, 1995) (Balick, V.C.).

Our Office has previously determined that FOIA does not require a public body to "specify what legal, personnel or other subjects are discussed in executive session." *Id.* See *Att'y Gen. Op.* 02-IB12 (May 21, 2002) ("Executive Session to Discuss Personnel" satisfied the agenda requirement of FOIA). "It is not necessary to identify the personnel in convening an executive session to consider personnel matters.'" *Att'y Gen. Op.* 03-IB20 (Sept. 3, 2003) (quoting *Att'y Gen. Op.* 96-IB27 (Aug. 1, 1996)).

The agenda for the Board's May 8, 2006 meeting stated that the "Board will vote immediately to go into executive session in the Superintendent's Conference Room for the purpose of discussing the following: Personnel Matters – See 29 Del.C. §10004(b)(9)." We determine that the Board's agenda gave sufficient notice to the public that it would discuss personnel matters in executive session.

At the May 8, 2006 meeting the Board also discussed the qualifications of job applicants for the position of superintendent. The Board did not include job applicants in the agenda for the

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meeting in violation of the notice requirements of FOIA. FOIA, however, authorized the Board to discuss in private "an individual citizen's qualifications to hold a job." 29 *Del. C.* §10004(b)(1). "Since the [Board] could have met in lawful executive session to discuss the qualifications of a job candidate . . . we find this to be a technical violation for which remediation is not necessary." *Att'y Gen. Op.* 03-IB20 (Sept. 3, 2003).

B. May 8, 2006 Executive Session – Purpose

According to the School Board, the minutes of the Board's May 8, 2006 executive session will not be presented for approval until the Board's July 2006 meeting. The Board provided us with a draft of those minutes. We feel free to quote from the draft minutes because they do not disclose the names, competency or abilities of any employee or qualifications of any job applicant.

The draft minutes show that the Board voted to go into executive session and then discussed "personnel matters with the following members of Dr. Harter's Executive Team from 6:00 p.m. until 6:45: Dr. Harter; Dr. Davis; David Blowman; Debbie Bullock; Ellen Marie Cooper; Barbara Meredith." The Board then discussed "other personnel matters with Sam Mikaelian and Deborah Raizes from Hazard, Young, Altea & Associates, Ltd. from 6:45 until 9:30."² The Board then voted to go out of executive session.

The School Board provided for our *in camera* review sworn affidavits by the members of the Board who attended the May 8, 2006 Executive Session (Craig Gilbert, Joseph Brumskill,

² Hazard, Young, Altea & Associates, Ltd. is the executive search firm retained by the School Board to help find a new superintendent.

Nancey Doorey, Sandra Skelley, Mark Huxsoll, Debra Heffernan, and Olivia Johnson-Harris). The affidavits³ confirm the Board's summary of the matters discussed during the May 8, 2006 executive session.

[T]he Board discussed, between themselves and with several members of the current superintendent's management team, the capabilities, and qualifications of current employees, individually or collectively, to manage the District after the current superintendent leaves and before the Board selects a new superintendent. In addition, the Board met with two employees of Hazard, Young & Attea, Ltd. ("HYA"), the search firm employed by the Board to provide expertise in the selection of the superintendent, and discussed the qualifications and potential success of specific employees for the superintendent position. The Board also discussed the names and qualifications of several potential external candidates for superintendent with HYA. During the course of this discussion the issue of the salary to pay the new superintendent was raised. Further, the Board articulated some of the qualifications it wanted in the new superintendent by discussion of the strengths and weaknesses of the current superintendent with the HYA.

Board's Letter dated June 19, 2006.

The new superintendent's salary does not fall squarely within FOIA's exception for executive session to discuss "an individual citizen's qualifications to hold a job." 29 *Del. C.* §10004(b)(1). We have previously determined that FOIA protects "the competitive position of a public body engaged in ongoing contract negotiations." *Att'y Gen. Op.* 05-IB24 (Aug. 18, 2005). Premature

³ In "our investigations and determinations under Section 10005(e) of FOIA, we must hold public bodies to their burden of proof to justify going into executive session for a purpose authorized by statute." *Att'y Gen. Op.* 03-IB23 (Oct. 20, 2003). When the minutes of an executive session are cursory, we will rely on "affidavits from those in attendance specifying in more detail the matters discussed." *Id.*

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disclosure of the salary the Board might be willing to pay "could compromise the public body's (and the public's) competitive position in [salary] negotiations." *Att'y Gen. Op* 05-IB13 (May 9, 2005). We determine that FOIA permitted the Board to discuss in private the salary for a new superintendent.

During the May 18, 2006 executive session, the Board also discussed with its search consultants the desired qualifications for a new superintendent. In *Att'y Gen. Op*. 02-IB17 (Aug. 6, 2002), our Office determined that discussions by the school board and a search consultant did not fall within FOIA's job applicant exemption for executive session. In that case, the school board discussed "the mechanics of the selection process. The Board talked about a point scoring and tiering system; questions to ask the candidates; district demographics; what the Board expected of a superintendent; and scheduling interviews and site visits."

We distinguish *Att'y Gen. Op*. 02-IB17 because the Board discussed the qualifications for a new superintendent by reference to the "strengths and weaknesses of the current superintendent." Because the qualifications for a new superintendent were inextricably entwined with the "competency and abilities of individual employees," 29 *Del. C.* §10004(b)(9), we determine that this subject was covered by FOIA's personnel exemption for executive session.

Towards the latter part of the executive session on May 8, 2006, the Board discussed several matters which did not involve the job performance of current employees or qualifications of job applicants.

The Board also discussed the dates upon which the public would participate in the search process. Finally,

at the end of the Executive Session, the President of the School Board announced that (a) two employees would verbally attest to the financial statements in public session at the next Action meeting; (b) the Board Elections would take place at the May 22nd Action meeting; (c) the District Web site displays notice at the upcoming action meeting the discussion of the Mount Pleasant High School situation and Board elections; (d) Board discussion of the current superintendent's personnel recommendations would be moved to the June 26, 2006 executive session.

Board's Letter dated June 19, 2006.

The Chancery Court has observed that "[t]here is always a risk that a public body will drift into discussing matters beyond the proper purpose of an executive session." *Red Clay*, 1995 WL 733401, at p. 3. There was a clear dividing line, however, between the Board's discussion of the personnel and job applicant matters authorized by FOIA for private discussion, and the various procedural matters then discussed by the Board during executive session on May 8, 2006. The Board should have moved to go out of executive session to discuss those procedural matters in public.

We determine that the Board violated FOIA when it discussed various matters of public business to take up at future meetings (*e.g.*, public participation in the search process; financial statements; elections). We do not believe that any remediation is required for this violation because the Board did not take any action on these matters and reserved substantive discussion for future meetings. In the past, we have not directed remediation where the discussion "involved procedural or other matters that did not result in final action (*e.g.*, setting dates and times for interviewing candidates for position of City Clerk and to begin the budget process and meet with Trustees;"). *Att'y Gen. Op.* 05-IB15, Note 2 (June 20, 2005).

C. May 8, 2006 Executive Session – Minutes

FOIA requires a public body to record certain information in the minutes of meetings (members present, how they voted, action agreed upon). *See 29 Del. C. §10004(c)*. "But FOIA 'neither says that the subjects discussed must be summarized nor attempts to define how specific such summary should be.'" *Att'y Gen. Op. 97-IB23* (Dec. 23, 1997) (quoting *Red Clay*, 1995 WL 733401, at p.4). There is no "clearly implied statutory requirement to summarize the subjects discussed with any degree of specificity in the minutes of executive sessions." *Red Clay*, 1998 WL 733401, at p.4.

We have reviewed the format the Board uses to record its executive sessions in the draft minutes of the May 8, 2006 meeting and the minutes of the March 13 and 27, 2006 executive sessions you provided to us. The format records the names of the Board members in attendance; the motion and vote to go into executive session; the general nature of the matters discussed (student, property, personnel); and the motion and vote to adjourn the executive session. We determine that this format satisfies the minimum requirements of FOIA for preparing and maintaining minutes of executive sessions.

CONCLUSION

For the foregoing reasons, we determine that the Board violated the notice requirements of FOIA by not disclosing in the agenda for the Board's May 8, 2006 meeting that the Board would

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discuss, in addition to personnel matters, the qualifications of job applicants for the position of superintendent. We determine that the Board also violated FOIA by discussing several procedural matters at that meeting which FOIA did not authorize for executive session. We determine that the Board's format for recording minutes of executive sessions satisfies the minimum requirements of FOIA.

We do not direct any remediation for these FOIA violations because: (1) the Board could have lawfully met in executive session to discuss the qualifications of job applicants for the position of superintendent; and (2) the Board did not take any action on procedural matters which FOIA did not authorize for private discussion but rather deferred any substantive discussion of those matters to future meetings.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

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